BEFORE THE

PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2017-381-A

In Re:

Office of Regulatory Staff's Petition for an Order Requiring Utilities to Report the Impact of the Tax Cuts and Jobs Act

RESPONSE TO SUPPLEMENTAL ARGUMENT

Palmetto Wastewater Reclamation, LLC, ("PWR") conditionally submits the within response to the May 9, 2018, "Supplemental Argument in Support of Petition to Intervene, Petition for Rehearing or Reconsideration, and Rescission of Order No. 2018-252" ("Filing") in the above-captioned docket.[1] For the reasons set forth below, PWR submits that the supplemental arguments advanced by Developers should be rejected, their Petition to Intervene and their putative Petition for Rehearing or Reconsideration be denied, and consideration of their request for rescission of Order No. 2018-252 in this docket be refused. In support thereof, PWR would respectfully show unto this Honorable Commission as follows:

1. Initially, PWR submits that S.C. Code Ann. § 58-5-320 provides no procedural basis for the Developers to make the Filing nor any substantive basis upon which the Commission may grant the relief requested in the Filing. To the contrary, this statute only provides for rescission of a

[1] This response is submitted conditionally as there is no provision of the Commission's Rules of Practice and Procedure which authorizes the filing of a "supplemental argument" and the Commission has not even granted leave for the Petitioners Lake Carolina Development, LLC, and LandTech, LLC (together, the "Developers") to intervene in this docket – much less submit the Filing. Accordingly, PWR submits that the Commission should not consider the Filing. However, should the Commission be disposed to do so, it should reject the Developers' supplemental arguments for the reasons set out herein.

Commission order on its own volition. Accordingly, it provides no basis for a request for relief on the part of Developers. Moreover, rescission of an order pertaining to an affected public utility is only appropriate where the Commission has "good cause" to do so (*see Carolina Pipeline Co. v. S.C. Public Service Comm'n*, 255 S.C. 324, 178 S.E.2d 669 (1971)) and where the affected public utility has no vested rights in the order. *See City of Columbia v. Tatum*, 174 S.C. 366, 177 S.E. 541 (1934). As to the former, no good cause is demonstrated in the Filing for the reasons discussed below. As to the latter, PWR has vested rights with respect to its ability to recover all costs associated with the extension of its service under Sections 9 and 10 of its approved rate schedule – including "an acceptable amount for multi-tap capacity" which Developers must agree to pay.[2] By including the Tax Multiplier in its authorized rate schedule, PWR only quantified the amount of this specific aspect of its cost of extending service and made it an approved rate so as to enable it to collect same from future customers (which Developers are not) and to avoid the necessity for obtaining Commission approval of contracts with entities making contributions in aid of construction ("CIACs") who are not customers to be served by PWR such as Developers. *Cf.* 10 S.C. Code Ann. Regs. 103-541 (2012). Stated another way, PWR already had the right to require that any person or entity seeking an extension of PWR's service facilities to agree to pay the taxes imposed upon it for accepting contributions in aid of construction and, should they refuse to do so, deny them an extension of service.[3]

[2] Sections 9 and 10 of the rate schedule approved in Exhibit 1 to Order No. 2014-752, issued September 18, 2014, in Docket No. 2014-69-S, as modified by Order No. 2018-252 ("PWR Rate Schedule"), which have also been in effect for PWR's Alpine system 2013, placed Developers on notice of their obligation to obtain PWR's agreement to extend its service to their projects – all of which Developers admit exceed the five-tap threshold under Section 10. *See* Developers' Petition to Intervene at ¶¶ 1 and 2. The right to recover all costs associated with such an extension is clearly a "vested right" held by PWR.

[3] Indeed, the Tax Multiplier provision of the PWR Rate Schedule expressly contemplates that PWR may contract **not** to collect the Tax Multiplier if the Commission so approves. *See* Filing at ¶2 ("[e]xcept as otherwise provided by contract approved by the South Carolina Public Service Commission…").

2. Developers' assertion that PWR's motion which resulted in Order No. 2018-252 "sought affirmative relief not anticipated by the scope of this Docket" (*see* Filing ¶1) is demonstrably incorrect. By its petition in this proceeding, the South Carolina Office of Regulatory Staff requested that "each utility should also propose procedures for changing rates to reflect [the] impacts" of the Tax Cut and Jobs Act of 2017. *See* ORS Petition, December 28, 2017, at 2.

3. Also demonstrably incorrect is Developer's assertion that Developers have an interest in this docket. *See* Filing ¶4. Because they are not customers, Developers' interest with respect to the Tax Multiplier approved in Order No. 2018-252 can only arise in the future – and then only if Developers were to refuse to pay PWR all costs associated with an extension of facilities to serve their future projects as demanded by PWR. *See* PWR Rate Schedule, Sections 9 and 10. PWR does not seek, and has not sought, to collect the Tax Multiplier on any CIAC for which an agreement under PWR Rate Schedule Section 9 and 10 existed between PWR and Developers on the effective date of the PWR Rate Schedule modification, which is April 4, 2018. Should Developers seek, in the future, to obtain an agreement from PWR for an extension of facilities which requires multi-tap capacity and, at that time, find the terms offered unacceptable, they then will have the ability to raise that issue with the Commission by way of a complaint under S.C. Code Ann.§58-5-290 (2015)[4] as noted in PWR's Objection to Developer's petition to intervene in this docket.[5]

[4] "Whenever the Commission shall find, after hearing, that the rates … [or] charges … demanded … by any public utility … are unjust, unreasonable … or in any wise in violation of any provision of law, the Commission shall … determine the just and reasonable …charges." *Id.*

[5] It is worth noting that Developers do not mention, must less address, the assertion in PWR's Objection that S.C. Code Ann. § 58-5-290 provides Developers with an opportunity to raise any issues they may have with respect to a demand by PWR for payment of the Tax Multiplier. *See* PWR Objection at 2, ¶2. PWR submits that the likely reason for this omission is that it wholly contradicts the Developers' assertion that they are being denied administrative due process under S.C. Const. art. I, §22. To the extent that the Commission is disposed to consider the Filing, PWR submits that the Developers' failure to address PWR's assertion with respect to § 58-5-290 should be deemed an admission by Developers that PWR is correct in this regard and that they should be denied any relief on that basis alone.

4. The Developers' assertions in Paragraph 5 of the Filing are a case of proving too much with respect to their claims of lack of notice and denial of administrative due process. This is so because Developers acknowledge therein that (a) PWR discussed the Tax Multiplier with them prior to filing its motion for approval of same and (b) the Tax Multiplier involves developers who make – not those who have made – contributions in aid of construction. Thus, by their own admission, Developers were on notice of this particular aspect of the Tax Cut and Jobs Act and PWR's intent to seek recovery of additional income taxes arising out of CIACs made in the future by Developers. Further, Developers will have every opportunity to address the imposition of the Tax Multiplier on any CIACs which they propose to make to PWR in the future in a proceeding under § 59-5-290 if it becomes necessary. Plainly stated, there is no administrative due process issue here and the Commission should summarily reject Developers' arguments to the contrary.

5. By their assertions in Paragraphs 6 through 9 of the Filing, Developers assert that the Commission Staff failed to satisfy various requirements of the Commission's Rules of Practice and Procedure with respect to providing notice of the proposed modification to include the Tax Multiplier in the PWR Rate Schedule. These assertions are erroneous for the following reasons:

(a) Contrary to Developers' contention in Paragraph 7 of the Filing, 10 S.C. Code Regs. 103-804.J does not pertain to notices of filing with respect to Commission proceedings, but only to notices of hearing. And, although 10 S.C. Code Regs. 103-804.I does pertain to notices of filing, it does not apply here as publication of a notice of filing is not required under 10 S.C Code Ann. Regs. 103-817.C.2 (which regulation is incorporated by reference in R. 103-804.I) because no hearing was required on PWR's motion under S.C.

Code Ann. § 58-5-240(G) (2015). Thus, no requirement to publish a notice of filing existed. *Cf.* Filing at ¶6.[6]

(b) Also erroneous is Developers' assertion (Filing at ¶¶8-9) that Order No. 2018-252 was issued in violation of 10 S.C. Code Regs. 103-829 because the ten (10) day period for a response to PWR's motion had not yet run. Developers fail to note that 10 S.C. Code Regs. 103-829 specifically permits the Commission to modify the time limits contained in this regulation. Moreover, when a matter does not require a hearing under § 58-5-240(G), as was the case with the PWR motion, the time limits of this regulation are inapplicable.[7] And, even assuming that these time limits had any application, they were certainly appropriate for waiver by the Commission under 10 S.C. Code Regs. 103-803 as the Motion had no impact on customers or Developers.

(c) Similarly without merit is Developers' contention that the Motion provided no "notice to those to *(sic)* whom it purported to bind." *See* Filing at ¶9. Orders of the Commission approving rates have the force and effect of law. *See S.C. Cable Television Ass'n v. Southern Bell*, 308 S.C. 216, 417 S.E.2d 586 (1992). Developers are presumed to have notice of the law and must exercise reasonable care to protect their interests. *See Smother v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 470 S.E.2d 858 (Ct. App. 1996). Because PWR's Rate Schedule Sections 9 and 10 have been previously approved by orders of the Commission and were in effect, Developers were on notice that PWR could require that they bear all costs of extending service to Developers' projects – including costs

[6] It should be noted that, implicit in Developers' assertion that a notice of filing was required to be issued and published with respect to this docket (see Filing ¶7), is the contention that every Commission order issued in this docket is invalid due to lack of administrative due process.

[7] "Motions … will be filed … at least ten (10) days **prior to the commencement of a hearing**." R. 103-829.A (emphasis supplied).

associated with CIACs. Further, because PWR seeks to impose the Tax Multiplier in the context of agreements for the extension of service reached only from and after April 4, 2018, and because Developers will have a right to challenge that in a complaint proceeding under § 58-5-290, there is simply no question of Developers being bound to pay the Tax Multiplier without notice.[8]

6. The Developers' assertions that they have been denied administrative due process and have or will suffer "substantial prejudice" as a result (see Filing at ¶¶ 11-13) are without merit. If and when Developers seek to obtain an extension of PWR's service under PWR Rate Schedule Sections 9 and 10, and assuming that they are unwilling to agree to the imposition of the Tax Multiplier at that time, Developers will have the ability to complain and request a hearing under § 58-5-290. There is no denial of due process as a result of the Commission's approval of the Tax Multiplier and no prejudice to Developers.

7. The contention that Developers are entitled to have "their rights" protected (*see* Filing at ¶14) to avoid placing them in a "bind" (*see* Filing at ¶15) is without merit. They are not customers of PWR and PWR has not sought to impose the Tax Multiplier on them.[9] Thus, no such rights that

[8] With respect to the "Exhibit A" referenced in Filing ¶10, no such document was attached with the copy provided to counsel for PWR by Developers' counsel. Nor is it posted on the Commission's Docket Management System. Accordingly, PWR is unable to address Developers' contentions regarding same. Regardless, by virtue of Developers' assertions in ¶5 of the Filing, it is obvious that Developers were well aware of this issue giving rise to the Tax Multiplier.

[9]Although Developers' putative Petition for Rehearing or Reconsideration asserts that a tax multiplier is unwarranted because it fails to take into account the impact upon Developers (*see* Developers' April 24, 2015, Petition for Rehearing or Reconsideration at 5), as noted above this assertion is based in part on the apparent, but incorrect, assumption that the tax multiplier will apply to extensions of PWR's service facilities agreed to before April 4, 2018.

Regardless, it is noteworthy that multiple other utilities have either applied for approval of a tax multiplier in this docket (*see*, e.g., April 30, 2018, request of CUC, Inc. *and* May 7, 2018, request of JACABB Utilities, LLC), applied for approval of a tax multiplier in a rate adjustment docket (*see* approved Application of Carolina Water Service, Inc., Docket No. 2017-292-WS *and* pending Application of Synergy Utilities, LLC, Docket No. 2017-28-S), or agreed to ORS's recommendation that a tax multiplier be included in a proposed adjusted rate schedule (*see* pending Application of Moore Sewer, Inc., Docket No. 2016-384-S) without objection from any interested third party. PWR submits that Developers will obtain a competitive advantage over other real estate developers served by other utilities

require protection now exist. Moreover, because they have no rights at issue, Developers have no interest in this docket and their Petition to Intervene and Petition for Rehearing and Reconsideration are therefore properly denied by the Commission on that ground alone. However, to the extent that Petitioners have any such rights, the Commission may not waive the express requirements of S.C. Code Ann. § 58-5-330 that only a party is entitled to seek relief on reconsideration or rehearing and a petition for such relief be filed by a party within twenty days. Because Developers cannot satisfy these requirements, their contentions in this regard are without merit and should be rejected.

8. Contrary to their assertion in Paragraph 16 of the Filing, the approval of the Tax Multiplier does not mean that Developers "will pay more to [PWR] as a result." As noted above, Developers have the choice to refuse to enter into an agreement with PWR for an extension of service under PWR Rate Schedule Sections 9 and 10 which requires payment of the Tax Multiplier and submit a complaint under § 58-5-290 challenging PWR's right to do so. Further, PWR does not seek to apply the Tax Multiplier to an agreement for the extension of service reached before April 4, 2018. And, should Developers choose to do so, they may recover the cost of the Tax Multiplier in the price of their real property that is sold. Accordingly, approval of the Tax Multiplier under § 58-5-240(G) was entirely appropriate.

9. For the reasons discussed in Paragraph 1 hereof, § 58-5-320 does not allow Developers to seek the relief they request. Further, there is no proper petition for reconsideration or rehearing before the Commission which warrants the granting of the relief Developers seek. And, because Developers have not been deprived of any notice, there exists no reason to rescind Order No. 2018-252.

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if they are permitted to avoid the application of the tax multiplier – a rate schedule provision which ORS has endorsed as it protects existing customers from the adverse impacts of the Tax Cuts and Jobs Act. *See, e.g.*, Dir. Test. of Anthony M. Sandonato, Docket No. 2016-384-S, ll. 6-12.

For all of the foregoing reasons, PWR submits that the Commission should refuse to consider the Filing. However, should the Commission be disposed to do so, the Developers have failed to demonstrate entitlement to any relief and their arguments to the contrary should be summarily rejected.

Respectfully submitted,

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This 16th day of May, 2018
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